IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL *et al.*,

Defendants.

Case No. 18-cv-4483
Judge Robert W. Sweet

DEFENDANT NFLMC'S REPLY MEMORANDUM
IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

PRELIMINARY STATEMENT

Plaintiff's attempt to impose upon the NFLMC a broad duty to monitor the Retirement Board's interpretation and administration of the Plan runs contrary to established law, ignores important distinctions between single-employer and multi-employer pension plans, and effectively defeats the purpose of appointing the Retirement Board in the first place. In any case, Plaintiff has not pleaded sufficient facts to demonstrate that the NFLMC has breached any purported duty to monitor. As discussed in more detail below, this Court should dismiss the claims against the NFLMC.

ARGUMENT

I. The Complaint Fails To Establish That The NFLMC Is A "Fiduciary" Under ERISA With Respect To The Board Actions Challenged In This Lawsuit

Plaintiff concedes that the NFLMC has no discretionary authority or control over the Plan or the decisions made by the Retirement Board or its appointed trustees. (*See* Pl. Opp. Br. (Dkt. No. 72) at 40 ("[N]othing in [the Complaint] suggests that either the Players Association or the Management Council was required to . . . oversee each and every medical review or usurp the authority of the Board.").) Instead, Plaintiff argues that the NFLMC may be sued as a "fiduciary" under ERISA because of its authority to appoint three members of the Retirement Board. As this Court has recognized, however, the mere "right to appoint and remove fiduciaries is insufficient to constitute fiduciary status." *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 356 (S.D.N.Y. 2009) (Sweet, J.); *see also* 29 C.F.R. § 2509.75-8 at D-2 (explaining that "persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures" are not plan fiduciaries because "[o]nly persons who perform one or more of the functions described in section 3(21)(A) of the Act with respect to an employee benefit plan are fiduciaries"). Nonetheless, Plaintiff argues that the ability to appoint trustees to the Retirement Board results in

a fiduciary duty to monitor those appointees, including the duty to take "certain actions to remedy the Board Defendants' breaches [of fiduciary duty]" and to replace Retirement Board members for decisions that Plaintiff alleges did not comply with ERISA. (Dkt. No. 72 at 40-41.) Plaintiff provides no authority to support the imposition of such a broad and undefined duty on contributing employers such as the NFLMC.

Indeed, Plaintiff does not even acknowledge the clear Supreme Court authority that, in the context of a multi-employer benefit plan, the Labor Management Relations Act ("LMRA") prohibits a contributing employer like the NFLMC (or its union counterpart, the NFLPA) from directing or supervising the determinations made by trustees they appoint. *See N.L.R.B. v. AMAX Coal Co.*, 453 U.S. 322, 330 (1981). To the contrary, Plaintiff's arguments regarding the NFLMC's alleged fiduciary duty wholly ignore material distinctions between single-employer pension plans and multi-employer pension plans, which necessarily impact the scope of any fiduciary obligations. As explained in the NFLMC's Motion to Dismiss, imposing a duty to monitor on contributing employers would be contrary to the laws governing multi-employer benefit plans, which, as collectively bargained plans, must adhere to special rules and requirements for their administration and operation set forth in the LMRA. Thus, under the LMRA, multi-employer plans jointly established by contributing employers and unions (as with the Plan here) must be jointly administered by representatives from the contributing employers and the union. *See* 29 U.S.C. § 186(c)(5). These representatives cannot administer the trust in the interest of the party that appointed them, and the appointing parties may not direct or supervise the decisions of the trustees that they appoint. *See AMAX Coal Co.,* 453 U.S. at 330. Consequently, the contributing employers charged with appointing representatives to the board of trustees of a multi-employer plan cannot control the board of trustees—both by statutory design and by law.

Plaintiff ignores these longstanding rules and instead asks the Court to impose a broad duty to monitor the trustees on the NFLMC, effectively requiring the NFLMC to control its appointees. Not surprisingly, Plaintiff relies almost entirely on cases arising in the context of single-employer plans. Plaintiff's reliance on single-employer cases to argue that the NFLMC should have taken action to remedy the Retirement Board's alleged breaches of fiduciary duty is entirely misplaced and completely ignores the important distinction between single-employer and multi-employer plans: whereas the plan sponsor of a single-employer plan maintains authority over the trustees it appoints, contributing employers are prohibited by law from controlling the trustees they appoint. *See id*. Indeed, Plaintiff fails to cite a single case in the multi-employer plan context where, as Plaintiff alleges here, a contributing employer to a multi-employer plan with authority to appoint and remove trustees was found to have any duty to monitor the actions of its appointed trustees—beyond assuring that the appointed trustees are performing their basic administrative functions.[1] Moreover, Plaintiff does not cite a single case in which a court charged contributing employers of multi-employer plans with the duty or obligation to review plan documents (including amendments or Summary Plan Descriptions ("SPDs")), and to remove and replace appointed trustees if they disagree with the drafting of such documents.[2]

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[1] The Department of Labor guidance cited by Plaintiff does not, as Plaintiff suggests, establish that the NFLMC had a fiduciary duty to monitor. (Dkt. No. 72 at 36.) The guidance presupposes that the appointing entity was an established fiduciary—it does not suggest that an entity with the power of appointment becomes a fiduciary due to the exercise of that power. *See* 29 C.F.R. § 2509.75-8 at FR-17 ("What are the ongoing responsibilities *of a fiduciary* who has appointed trustees or other fiduciaries . . . .") (emphasis added).

[2] In the handful of duty to monitor cases in the multi-employer plan context on which Plaintiff relies, none found the broad duty to monitor that Plaintiff proposes here. Rather, these cases—all of which are materially different from the present case—found that the duty to appoint conferred only a limited obligation on the appointing parties. *See Liss v. Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998) (egregious fact pattern involving allegations of "gross mismanagement" and self-dealing)*; Int'l Bhd. of Elec. Workers, Loc. 90 v. Nat'l Elec. Contractors Ass'n*, No. 3:06cv2 (SRU), 2008 WL 918481, at *7 (D. Conn. Mar. 31, 2008) (duty to monitor claim brought against employer

Instead, virtually all of the cases Plaintiff cites involve courts imposing a duty to monitor on entities with appointing and removal power in the single-employer context in conjunction with claims against trustees for breach of duty of loyalty and prudence relating to investment decisions (i.e., "stock drop" cases). For instance, in *In re Polaroid ERISA Litigation*, fund managers and plan administrators continued to purchase Polaroid stock on behalf of a single-employer retirement plan despite the corporation experiencing severe financial problems that ultimately lead to bankruptcy. 362 F. Supp. 2d 461, 464 (S.D.N.Y. 2005). In addition to suing the investment fund managers and plan administrators for breach of fiduciary duties, the plaintiffs also sued the CEO of Polaroid, who was responsible for appointing the fund managers and plan administrators, alleging that he breached his fiduciary duty to monitor those whom he appointed. *Id.* at 477. In determining that plaintiffs had stated a claim for breach of duty to monitor, the court noted that the CEO had firsthand knowledge of Polaroid's business problems but failed to inform the individuals he appointed, and therefore failed to ensure that the fiduciaries he appointed understood the risk inherent in continued investment in Polaroid stock. *Id.*

The other single-employer plan cases cited by Plaintiff are similarly inapposite to the present case. *See, e.g., In re Fannie Mae 2008 ERISA Litig.*, Nos. 09 Civ. 1350 (PAC), 09 MDL 2013 (PAC), 2012 WL 5198463, at *7 (S.D.N.Y. Oct. 22, 2012) (finding that director defendants, who had the authority to appoint trustees to manage retirement plan, breached duty to monitor when the director defendants "knew or should have known that [Fannie Mae] was in a dire situation and that [the appointed trustees] were doing nothing to protect the Plan's assets"); *In re AIG ERISA Litig. II*, No. 08 Civ. 5722 (LTS), 2011 WL 1226459, at *9 (S.D.N.Y. Mar. 31, 2011)

association who had power to appoint three employer representatives but had only appointed one (not the requisite three), and the one appointed trustee failed to attend meetings and cast votes).

("[A]llegations of a failure by the appointee fiduciaries to act upon factual circumstances constituting warning signs that warranted further investigation into the prudence of maintaining AIG stock as an investment option . . . is a sufficient antecedent claim to support a breach of the duty to monitor."); *Veera v. Ambac Plan Admin. Comm.*, 769 F. Supp. 2d 223, 231 (S.D.N.Y. 2011) ("[T]he Monitoring Defendants are alleged to have simply stood by and watched the value of Ambac stock decline precipitously [and therefore,] monitoring fiduciaries failed to provide sufficient attention, if any, to the risks of the continued purchase and retention of Ambac stock."); *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 366 (S.D.N.Y. 2009) (finding sufficient allegation of failure to monitor claim when "as Company Stock in the [retirement] Plans declined in value by nearly $3 billion dollars, the Monitoring Defendants did nothing").

In all these cases, the duty to monitor imposed upon an appointing individual or entity related to the appointed trustees' *investment decisions*, and not their administrative decisions.[3] At most, the cases cited by Plaintiff require employers sponsoring single-employer plans to maintain some reasonable oversight over the professionals to whom they grant discretion over plan assets. The cases cited by Plaintiff simply do not support his contention that the NFLMC had a duty to review the administrative decisions of the Retirement Board—such as the language used in amendments and SPDs—and replace trustees who made decisions with which it disagrees.

[3] The single-employer "stock drop" cases relied upon so heavily by Plaintiff are also inapplicable in the multi-employer context because contributing employers to a multi-employer plan legally cannot have a role in plan administration and investment decisions. *See Amax Coal*, 453 U.S. at 330 ("[N]othing in language of [the LMRA] reveals any congressional intent . . . that an employer may direct or supervise the decisions of a trustee he has appointed.").

II. Plaintiff Has Not Alleged Facts to Support a Duty To Monitor Claim Against the NFLMC

Even where the authority to appoint trustees to a multi-employer benefit plan has been found to confer fiduciary status under ERISA, any duty to "monitor" those trustees has been held to be limited. Thus, "a party is a fiduciary only as to the activities which bring the person within the definition," and therefore the duty to monitor is limited in scope. *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996) (internal citations omitted). For instance, in *Local 90*, one of the few multi-employer cases to find a duty to monitor, the court noted that the employer association's "fiduciary obligations are, of course, limited to those aspects of the plan of which [it] exercises authority or control." 2008 WL 918481, at *6 (internal citations omitted). Thus, the appointing union breached its duty to monitor appointed trustees when it "failed to monitor and replace trustees who continuously failed to fulfill their duties as trustees to the plans, including reasonable attendance at plan meetings and reasonable efforts to cast votes on plan issues." *Id.* at *8. *See also Sommers Drug Stores Co. v. Corrigan Enter., Inc.*, 793 F.2d 1456, 1460 (5th Cir. 1986) ("[I]f an employer and its board of directors have no power with respect to a plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions.") (internal citations omitted); *Coyne*, 98 F.3d at 1466 n.10 ("[W]e do not mean to suggest that the responsibility to monitor appointees exposes the appointing fiduciary to open-ended liability."). Plaintiff completely ignores this settled principle.

Indeed, the Complaint here contains no such allegations. Plaintiff has not alleged that the Board members appointed by the NFLMC failed to attend meetings, failed to vote, or otherwise neglected specific functions related to its administration of the Plan. Rather, Plaintiff's allegations focus entirely on the Retirement Board's substantive interpretation of the Plan and the Retirement Board's language choices in drafting plan documents. These allegations cannot support Plaintiff's

breach of fiduciary duty claims against the NFLMC. *See Lehman*, 2011 WL 4632885, at *7 (in case involving claims regarding management of a plan and communication with plan participants, finding that director defendants—who had authority to appoint and remove trustees—were not fiduciaries with respect to the management of the plan or communications about the plan).

Nevertheless, Plaintiff alleges that the NFLMC "should have known" six specific items of information, and enumerates five specific actions the NFLMC "should have taken" with respect to the Retirement Board. (Dkt. No. 72 at 39.) Besides being speculative and conclusory, Plaintiff's "should have" allegations are wholly unsupported by authority. Indeed, the actions that Plaintiff insists should have been taken would effectively create a "super board" to review the Retirement Board's decisions. In addition to being at odds with the LMRA, such a broad duty to review would defeat the entire purpose of having a board of trustees in the first place, as numerous courts have recognized. *See, e.g., Johnson v. Evangelical Luthern Church in Am.*, No. 11-23 (MJD/LIB), 2011 WL 2970962, at *5 (D. Minn. July 22, 2011) ("The duty to monitor is limited and does not include a duty to review all business decisions of Plan administrators because that standard would defeat the purpose of having trustees appointed to run a benefits plan in the first place." (internal citations omitted)); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009) (finding that the duty to monitor has "clear limits" and that a broad duty to monitor would undermine the rational of delegating authority to a committee).

Lastly, as pointed out in the NFLMC's Motion to Dismiss, Plaintiff's claims against the NFLMC also fail because Plaintiff has failed to show that the Retirement Board breached its fiduciary duties. (*See* Dkt. No. 57.) If there is no underlying breach of fiduciary duty, there can be no failure to monitor claim. *See In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*,

763 F. Supp. 2d 423, 580 (S.D.N.Y. 2011) ("With no antecedent breach by the monitored parties in this case, . . . [the] duty to monitor claim fails.").

III. Counts IV And V Fail To State Any Claim Against The NFLMC

In Count IV, Plaintiff seeks to have this Court invalidate a 2017 amendment ("2017 Amendment) to the NFL Player Neurocognitive & Disability Plan (the "Disability Plan") and declare that the Retirement Board should apply terms of the Plan that were in effect prior to the 2017 Amendment. Plaintiff's Complaint and Opposition Brief are void of any allegations as to the authority, if any, that the NFLMC has over the Disability Plan, which is a wholly separate multi-employer plan. Moreover, Plaintiff fails to explain how this Court can invalidate an amendment to the Disability Plan when neither that plan nor its board of trustees are parties to this action.[4]

As to the NFLMC, Count V is moot because it is predicated on the NFLMC's breach of fiduciary duty. As explained above, the NFLMC owes no general fiduciary duty to participants of the Plan. To the extent even a limited fiduciary duty to monitor exists, it only requires the NFLMC to ensure that the NFLMC-appointed fiduciaries carry out their basic administrative duties—e.g., regular attendance of trustee meetings, processing of claims, drafting and publishing Plan documents. Plaintiff fails to allege any facts supporting a claim that the Retirement Board failed to perform these functions and, therefore, fails to state a breach of fiduciary duty claim against the NFLMC. Accordingly, Count V should dismissed against the NFLMC.

[4] To the extent Plaintiff's claim in Count IV is a "failure to disclose" cause of action, the duty to disclose under ERISA rests with the plan administrator. 29 U.S.C. § 1021. Plaintiff does not—and cannot—allege that the NFLMC is the plan administrator. Thus, the NFLMC is not a proper party to this claim. And even if the Court finds that relief under Count IV is warranted—which it is not—the NFLMC's inclusion in this case is not necessary for the Court to grant the relief requested.

CONCLUSION

For the reasons stated above, as well as those set forth in the NFLMC's memorandum in support of its motion to dismiss (Dkt. No. 53), the NFLMC respectfully requests this Court to dismiss Plaintiff's complaint for failure to state a claim.

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Respectfully submitted,

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